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May 7, 2003
DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Name of Case: Worker Appeal

Date of Filing: March 28, 2003

Case No.: TIA-0024

XXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for DOE assistance in filing for state workers' compensation benefits based on the employment of his late father, XXXXXXXXXX (the worker). The DOE Office of Worker Advocacy determined that the worker was not a DOE contractor employee and, therefore, that the applicant was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the determination is correct.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "facility owned, operated, or occupied by a beryllium vendor" (beryllium vendor facility) in the case of beryllium illness. *See* 42 U.S.C. § 7384l(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice

Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. § 7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests claim. 42 U.S.C. § 7385o(e)(3). The DOE program is limited to DOE contractor employees performing work at DOE facilities because DOE and DOE contractors would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule. *See* 67 Fed. Reg. 52,841 (August 13, 2002) (to be codified at 10 C.F.R. Part 852). The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information about the program. 1/

Pursuant to an Executive Order, the DOE has published a state-by-state list of facilities covered by the DOL and DOE programs. The entry for each facility contains a code designating its status under the EEOICPA: (i) atomic weapons employer facility (designated by the code "AWE"), (ii) beryllium vendor facility (designated by the code "BE"), or (iii) DOE facility (designated by the code "DOE"). 67 Fed. Reg. 79,068 (December 27, 2002) (current list of facilities). 2/ The DOE's facility list also refers readers to the DOE Office of Worker Advocacy web site for additional information about the facilities. 67 Fed. Reg. 79,069.

1/ *See* www.eh.doe.gov/advocacy.

2/ *See* Executive Order No. 13,179 (December 7, 2000). The DOE first published a list in January 2001, 66 Fed. Reg. 4003 (January 17, 2001), and a revised list in June 2001, 66 Fed. Reg. 31218 (June 11, 2001).

This case involves the DOE program, i.e., the program through which DOE contractor employees may obtain independent physician panel determinations that their illness is related to their exposure to a toxic substance during their employment at a DOE facility. The applicant states that the worker was employed by Bethlehem Steel at its Lackawanna, New York plant from approximately 1939 to 1964, and that the worker became ill as a result of that employment.

The DOE Office of Worker Advocacy determined that the worker was not employed by a DOE contractor at a DOE facility. Instead, the DOE Office of Worker Advocacy indicated that the worker was employed at an atomic weapons employer facility. *See* November 14, 2002 letter from DOE Office of Worker Advocacy to the applicant. Accordingly, the DOE Office of Worker Advocacy determined that the worker was not eligible for the physician panel process. In the appeal, the applicant disagrees with that determination.

II. Analysis

A. Worker Programs

As an initial matter, we emphasize that the DOE physician panel process is separate from state workers' compensation proceedings. A DOE decision that an applicant is not eligible for the DOE physician panel process does not affect (i) an applicant's right to file for state workers' compensation benefits or (ii) whether the applicant is eligible for those benefits under applicable state law.

Similarly, we emphasize that the DOE physician panel process is separate from any claims made under other statutory provisions. Thus, a DOE decision concerning the physician panel process does not affect any claims made under other statutory provisions.

We now turn to whether the applicant in this case is eligible for the DOE physician panel process.

B. Whether the Applicant is Eligible for the DOE Physician Panel Process

As explained above, the DOE physician panel process is limited to DOE contractor employees. In order to be a DOE contractor employee, a worker must be employed by a firm that manages or provides other specified services at a DOE facility, and the worker must actually be employed at the DOE facility. As explained below, the Bethlehem Steel plant was not a DOE facility and, therefore, the worker was not a DOE contractor employee.

The DOE facility list indicates that the Bethlehem Steel plant was not a DOE facility. The DOE facility list includes the plant but identifies the plant as an "atomic weapons employer facility" (AWE) from 1949 to 1952. The DOE description states that in 1949 the plant developed rolling mill pass schedules to be used in the planned uranium milling operation at DOE's Fernald facility. The description also states that the plant performed uranium rolling experiments to help design the Fernald rolling mill. 3/ This description is consistent with the DOE's report on the plant under the Formerly Utilized Sites Remedial Action Program (FUSRAP). *See* FUSRAP Considered Sites Database Report, www.em.doe.gov (searchable database) (accessed April 7, 2003).

In a prior decision, we held that the Bethlehem Steel plant was not a DOE facility. *See Worker Appeal*, Case No. TIA-0010, 28 DOE ¶ 80,261 (2003). In that case, we noted that under the EEOICPA and the Physician Panel Rule, a DOE facility is a facility (i) where DOE conducted operations and (ii) where DOE had a proprietary interest or contracted with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 42 U.S.C. § 7385o(l)(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). We concluded that the DOE description of the work at the plant did not indicate that DOE conducted operations at the plant, had a proprietary interest in the plant, or had a contract with the entity to provide management and operation, management and

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3/ The Fernald rolling mill began operations in 1952. The DOE's web site contains a report describing DOE facility operations, including Fernald. *See* www.eh.doe.gov/legacy.

integration, environmental remediation services, construction or maintenance services. Accordingly, we concluded that the plant did not fall within the definition of a DOE facility. *Worker Appeal,* 28 DOE at 80,841, slip op. at 4.

In the instant appeal, the applicant states that the Bethlehem Steel plant was not an atomic weapons employer facility, because the plant "produced all kinds of steel products." As an initial matter, we note that the definition of "atomic weapons employer facility" is not limited to facilities exclusively engaged in atomic weapons work. *See* 42 U.S.C. § 7384o(5). More importantly, the issue here is whether the Bethlehem Steel plant was a DOE facility. The DOE description of the plant, the FUSRAP report, and the description provided by the applicant indicate that the plant was privately owned and operated by Bethlehem Steel and, therefore, that DOE did not conduct operations at the facility, have a proprietary interest in the facility, or contract for management and operation, management and integration, environmental remediation services, construction or maintenance services of the facility. *See* 42 U.S.C. § 7384l(12); 67 Fed. Reg. 52854 (to be codified at 10 C.F.R. § 852.2). Accordingly, the plant was not a DOE facility and its workers are not eligible for the DOE physician panel process. This makes sense because DOE would not be involved in any state workers' compensation proceedings involving the plant and its workers.

As the foregoing indicates, the worker was not employed at a DOE facility and, therefore, the applicant is not eligible for DOE assistance in filing for state workers' compensation benefits. Again, we emphasize that this determination does not affect whether the applicant is eligible for (i) state workers' compensation benefits or (ii) federal monetary and medical benefits available under other statutory provisions.

IT IS THEREFORE ORDERED THAT:

(1) The Appeal filed in Worker Appeal, Case No. TIA-0024 be, and hereby is, denied.

(2) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: May 7, 2003